

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

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AT RICHMOND, OCTOBER 8, 1998

APPLICATION OF

VYVX OF VIRGINIA, INC.

CASE NO. PUC970047

For a certificate of public  
convenience and necessity to  
provide interexchange telecommunications  
services and to have its rates  
determined competitively

ORDER ON REQUEST FOR CERTIFICATE  
AND FOR RULE TO SHOW CAUSE

On April 23, 1997, Vyvx of Virginia, Inc. ("Vyx" or "Company") filed an application seeking authority to provide "intrastate interLATA telecommunications services" and to have the rates for those services "based on competitive factors," pursuant to §§ 56-265.4:4 B and 56-481.1 of the Code of Virginia. The Company's application further sought authority to "construct, acquire, extend, and operate equipment and facilities to be used in the operation of an intrastate telecommunications public utility." The facilities proposed in the application consisted of an underground fiber optic telecommunication line traversing the Commonwealth from south of Danville to a point near Manassas, representing the Virginia portion of a line that originated in Houston, Texas.

On September 23, 1997, the Commission entered an Order directing Vyvx to respond to complaints that had been lodged against its application and to address other questions set forth in the Order. The Order required Vyvx to declare the authority it asserted it possessed to acquire property by use of the power of eminent domain for the construction of the facilities proposed in the application.

On October 1, 1997, the Company filed its response, reiterating the need for a certificate of public convenience and necessity under § 56-265.2 of the Code of Virginia, and alleging its authority to exercise the power of eminent domain. On October 17, 1997, the Commission Staff filed a motion requesting the Commission to enter an order finding that Vyvx required certifications from the Commission both for its provision of telephone service in the Commonwealth and for the construction of the facilities to provide such service. The Staff motion further asserted that Vyvx may not exercise eminent domain before it receives a certificate from the Commission finding the necessity for the construction of the proposed facilities.

Based on the application and the foregoing pleadings, the Commission, by its Order of November 25, 1997, found that, "Vyvx is not yet 'lawfully authorized to operate' anywhere in the Commonwealth and . . . its proposed construction is not an ordinary extension or improvement of its facilities, and

therefore requires certification," pursuant to Code § 56-265.2.<sup>1</sup> The Order also directed Vyvx to "cease acquisition of property or rights therein, by exercise of, or by implying its right to exercise, eminent domain authority" until the Commission had acted upon the application.

On January 14, 1998, the Commission granted Vyvx a certificate pursuant to Code § 56-265.4:4 to provide interexchange services, subject to the Commission's rules for such services, and permitted the Company to price its services competitively. This Order stated that the facilities construction application would be addressed separately.

On January 26, 1998, Vyvx asked permission to amend its application to include proposed construction of a lateral extension from its proposed line, to branch off the main line and run into the City of Richmond, passing through the Counties of Fluvanna, Goochland, and Henrico. The requested amendment was permitted by order dated January 28, 1998.

Thereafter, the Commission's Division of Communications received reports, on February 9 and 11, 1998, of damage to Bell Atlantic-Virginia ("BA-VA") telephone cable facilities in Goochland County, Virginia. These cable cuts resulted in

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<sup>1</sup> This provision makes it "unlawful for any public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service without obtaining certification from the Commission that "the public convenience and necessity require the exercise of such right or privilege[.]"

outages of telephone service, including 911 service, to several thousand customers for several hours. Upon investigation, it was found that the contractor who cut BA-VA's cable in the course of construction was installing Vyvx' proposed facilities.

On February 12, 1998, the Staff of the Commission ("Staff") filed a Motion for Rule to Show Cause requesting the Commission to enter an order directing Vyvx to show cause why it should not be sanctioned for failure to obey Commission rules and orders regarding the construction of its proposed telecommunications facilities. The Company filed its response to the motion on February 17, 1998, representing that its corporate parent had undertaken the construction of the underground fiber optic line.

On May 5, 1998, following the receipt of other pleadings, the Commission issued its Order on Request for Hearing and Rule to Show Cause and set the matters in the Rule and in the Company's application for a certificate of public convenience and necessity pursuant to Va. Code § 56-265.2 for hearing on June 10, 1998.

In response to Commission Orders, on May 21, 1998, the Staff filed a "Statement of Facts and Request for Relief" requesting imposition of a fine against Vyvx for its construction of the facilities in the absence of certification and for revocation of the Company's certificate to provide interexchange services, which was previously granted by Order of

January 14, 1998. Vyvx filed responses to the Staff's statement, and the parties filed a Stipulation of Undisputed Facts on June 3, 1998.

The matter was timely heard on June 10, 1998. Appearances were entered, and testimony was received on behalf of the Company, the Staff, and Protestants, Mark Decot and John and Janete Cassell. One public witness, Joanne Shaffer, appeared and testified. The Staff and parties filed post-hearing briefs on July 15 and July 30, 1998.

NOW THE COMMISSION, on the basis of the record herein, deems the Company's application for a certificate of public convenience and necessity under Code § 56-265.2 not to be in the public interest. The Commission finds that the public interest and convenience do not require the exercise by Vyvx of the rights and privileges under this section, all upon the following:

a. By its application filed April 23, 1997, the Company requested authority to construct equipment and facilities to be used in the operation of an intrastate telecommunications public utility, and represented to the Commission that it would "build and operate" the facilities as a public service company; and

b. By the above-referenced Order of November 25, 1997, the Commission found the applicant must be separately certified to

provide service and to build the facilities proposed in the application; and

c. By its Order of January 14, 1998, granting Vyvx a certificate to provide interexchange telecommunications services, the Commission reiterated that the Company was also seeking, and was required to obtain, certification pursuant to Code § 56-265.2 in order to construct its proposed facilities, and that this certificate would be addressed by separate order; and

d. The Company sought and obtained permission to amend its application, to include construction of additional facilities; and

e. While all of the above was transpiring, the Company and its corporate parent, without notice to the Commission, and without the requisite authority pursuant to Code § 56-265.2, were constructing, and had essentially completed construction of, the facilities for which such authority was sought; and

f. Such construction was carried out knowingly and by design of the Company<sup>2</sup> and, as admitted in the testimony of its

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<sup>2</sup> We reject Vyvx' contention that it should be absolved because the construction was actually undertaken by its affiliate. The record reflects that Vyvx obtained the land rights for the project, and an underground facility cannot be built without such rights to land. We find that Vyvx acted in concert with its affiliate in the construction of the facility.

own witnesses in the June 10 hearing before this Commission, such construction had begun as early as September 1997;<sup>3</sup> and

g. The construction of the originally described line and the lateral line described in the amendment is now an accomplished fact.

ACCORDINGLY, the construction of the lines having been completed without the Company's having first obtained a certificate from this Commission that the public convenience and necessity require the exercise by the Company of such right or privilege, and without an opportunity for or actual hearing on the Company's application as contemplated by Code § 56-265.2 prior to such construction, the Commission finds that no certificate of public convenience and necessity could be meaningful under these circumstances.

In consideration of all of the above, we find that:

(1) Vyvx has failed and refused to obey the Commission's orders of November 25, 1997, and January 14, 1998, in that those Orders found that receipt of certification from this Commission was a necessary requisite to construction of the proposed facilities.

(2) The misrepresentations and misstatements in the application do not relate to the Company's ability to provide

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<sup>3</sup> Indicating that by the application of April 23, 1997, Vyvx was indeed seeking permission to construct, rather than to acquire, facilities.

interexchange services. Rather, these statements apply to that part of the application in which Vyvx requests a certificate to construct facilities.

Accordingly, IT IS ORDERED as follows:

(1) The request of the Staff that we revoke Vyvx' certificate to provide interexchange services is denied;

(2) The application of Vyvx for a certificate of public convenience and necessity to construct telecommunications facilities is denied;

(3) Vyvx shall be fined the sum of \$197,000,<sup>4</sup> pursuant to Code § 12.1-33, of which \$175,000 is suspended, conditioned upon the applicant not violating any order or rule of the Commission or any statutes of the Commonwealth of Virginia for a period of 5 years from the date of entry of this Order, and the payment of costs ordered herein;

(4) Vyvx shall reimburse the Commonwealth all costs of this proceeding related to its application for a construction certificate pursuant to § 56-265.2, and Staff shall file a bill of such costs with the Commission on or before October 21, 1998;

(5) Such fines and costs shall be paid by Vyvx on or before December 31, 1998; and

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<sup>4</sup> Representing the fine of \$1,000 per day for each day's violation commencing November 25, 1997, and ending June 10, 1998, the day of the hearing herein.



(6) This matter is continued for further orders of the Commission.